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IN THE

Supreme Court of the United States

No. 17 OCTOBER TERM—1952

KWONG HAI CHEW

Petitioner

vs.

CAPT. SVEND COLDING, Master of SS "Sir John Franklin," and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

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Rogers Press, Inc., 53 Beekman Street, New York, N. Y., BEekman 3-1040-1051 — 110

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Opinions Below

The opinion of the District Court is reported in 97 Fed. Supp. 592, and that of the Court of Appeals in 192 F. 2d 1009. These opinions are incorporated in the record at pages 39-45 and 51-54, respectively. The granting of certiorari is noted in 343 U. S. 933.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered December 4, 1951

(R. 55). The petition for certiorari was filed February 28, 1952 and was granted April 28, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether petitioner, who is a seaman, a permanent resident of the United States, and an applicant for citizenship therein, may, on his return from a voyage on an American vessel leaving from and returning to an American port, be detained at such American port and ordered deported without notice of the charges against him and without a hearing.

Statutes and Regulations Involved

The petitioner was ordered deported under authority of Section 175.57(b), Title 8, Code of Federal Regulations (Appendix, p. 10a). These regulations, together with the other relevant statutes and regulations, are printed in the Appendix.

Statement of the Case

Establishment of Residence and Application for Citizenship

Petitioner, an alien, born in China, is by occupation a seaman (R. 13). In 1946 he married a native American (R. 34) and in 1949 or 1950 purchased a house in New York in which he lived with her (R. 19). He has not established a residence in any other country but the United States (R. 5).

In July 1949 (63 Stat. 1240; 81st Congress, 1st Session) he was admitted to permanent residence in the United States as of January 10, 1945 (R. 18). He was thereafter

advised that he was eligible to apply for naturalization (R. 18). He filed an application for naturalization in New York City in April of 1950 (R. 13) and this application is still pending (R. 35).

Petitioner had never been arrested, either in this country or abroad (R. 5); had never had any difficulty with the authorities (R. 22). He lived a regular, orderly life. For his services in the Merchant Marine in the second World War he received a letter from the President of the United States citing him for his war service (R. 41).

The Voyage on the Franklin

In November, 1950, petitioner signed articles as a Chief Steward on the SS *Sir John Franklin* of the Isbrandtsen Line (R. 34), a ship of American Registry with the home port of New York (R. 5). At that time he was screened and passed by the Coast Guard (R. 40). The voyage lasted some four months (R. 23). The freighter left New York in November, 1950, stopped at various Far Eastern ports (R. 20) and returned to New York in March, 1951 (R. 40). Petitioner remained on board the *Franklin* during the voyage (R. 19).

Petitioner's Reasons for Believing That His Residence and the Privileges Attaching Thereto Were Not Impaired by the Voyage

At the time petitioner left on the voyage, he had no reason to believe that he was in any way impairing his continuing American residence and its foundation for American citizenship (R. 22).

Two investigations had been conducted to determine his eligibility for life in America. The petitioner applied for and after a hearing was granted permanent residence

under the suspension of deportation provisions of 8 U. S. C. 155(c) (R. 18, R. 33). In support of this application petitioner was required to present proof of good moral character for five years preceding his application. 8 U. S. C. 155(c). At the time of the application for suspension of deportation, the Immigration Service made a thorough examination into the life of the petitioner, his activities, beliefs, conduct, and all other matters involved in determining his eligibility for suspension of deportation and permanent residence (R. 33).

With the approval of the Attorney General and the concurrence of Congress, on July 20, 1949 (63 Stat. 1240, 81st Congress, First Session), deportation was suspended as of January 10, 1945 (R. 33), and petitioner was admitted for permanent residence upon payment of a fee of $18 (R. 18)[1].

In or about November, 1950, around the time when petitioner signed the articles of employment on the SS *Sir John Franklin* (R. 34) he was screened and passed by the Coast Guard. This screening shows that the applicant has established to the satisfaction of the Commandant that the character and habits of life of the applicant are such as to authorize the belief that his presence on board a vessel or within a waterfront facility would not "be inimical to the security of the United States" 33 C. F. R. Part 6, subchapter A, subpart 6.10-7.

Without this clearance the alien cannot serve on an American vessel (R. 34)[2]. With it, a seaman has on embarking upon a trip the equivalent of a re-entry permit.

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[1] The amended provisions of 8 U. S. C. 155(c) appear in the supplement. They require proof to the Attorney General of good moral character. The Attorney General is thereupon required to report to the Congress a detailed statement of the facts with reasons for the suspension. Congress, to make the suspension effective, must do an affirmative act—pass a concurrent resolution stating that the findings are accepted; otherwise the Attorney General is required to deport the alien. When the $18 fee has been paid and the alien admitted to permanent residence, his entry is charged to the appropriate quota.

[2] The technique of the Coast Guard clearance and the significance of being denied that clearance are discussed in *Parker v. Lester*, 98 F. Supp. 300 (N. D. Cal. S. D.).

Besides being cleared as to his moral character and being passed as an adequate security risk, petitioner had every reason to believe that his trip would not interfere with the prosecution of his application for citizenship, for the statutes of the United States had assured him that in this respect the voyage he was about to undertake was a continuation of his residence. 8 U. S. C. 707(d)(2).

Detention and Deportation of Petitioner

Four months later—four months after his clearance by the Coast Guard, petitioner received his first inkling that his residence in the United States was to be interrupted. This occurred when he arrived in American waters at the Port of San Francisco on March 10, 1951 (R. 21). "On the basis of information of a confidential nature", the immigration inspector temporarily excluded him under 8 C. F. R. 175.57 "as an alien whose entry is deemed prejudicial to the public interest" (R. 30). The *Franklin* proceeded coastwise, arriving in New York on March 29 (R. 31). Upon its arrival, the temporary exclusion of petitioner was continued. The case was then reported to the Attorney General who, on April 18, 1951, purporting to be acting under 8 C. F. R. 175.57(b) (R. 31, R. 32, R. 41), ordered that the petitioner be denied a hearing before a Board of Special Inquiry and that his temporary exclusion be made permanent.

At no time was petitioner informed of the charges against him or granted a hearing (R. 5). He has no basis of knowing what information might be adverse to him; so far as he now knows he has not done anything that would preclude him from being naturalized (R. 22).

Since March, 1951, he has been in detention. He is now at Ellis Island (R. 41). He cannot visit his wife who is ill

and dependent upon him for support (R. 34). Although his services were satisfactory and the *Franklin* was desirous of renewing his services for another voyage, he cannot re-enlist on that or any other American vessel because he cannot now obtain Coast Guard permission (R. 34). He is thus, in effect, denied the right to follow his chosen occupation. The motion for calendaring his application for naturalization was scheduled to be heard on May 1, 1951 (R. 35). He is blocked legally from pressing this application to a conclusion because of the ruling of the Attorney General. 8 U. S. C. 729. All these major misfortunes have come to a law-abiding resident without his knowing what charges have been leveled against him (R. 45), without any opportunity to establish that it may be a case of mistaken identity or that as to him the charges are false.

Habeas Corpus Proceedings

A writ of habeas corpus was issued on April 3, 1951 (R. 3) on the ground that the application of the restraint to the relator is arbitrary and capricious and a denial of due process of law in violation of the Fifth Amendment of the Constitution (R. 5). Hearings were commenced on April 16 (R. 12). There was an amended return after the Attorney General directed that the temporary exclusion be made permanent and that petitioner be denied a hearing before a Board of Special Inquiry (R. 31). There was an amended traverse to the return (R. 33). The District Court by order entered on May 21, 1951 dismissed the writ (R. 46). The Court of Appeals for the Second Circuit on December 4, 1951 affirmed the decision of the District Court (R. 54).

Decisions of the Lower Courts

The District Court for the Eastern District of New York (per GALSTON, *D. J.*), though expressing surprise that a

resident alien could be barred without a hearing (R. 42, R. 45) reluctantly came to the conclusion that the question was basically whether the Court had jurisdiction to review the act of the Attorney General (R. 42; 97 F. Supp. 592, 594). The Court felt bound by the decision in *Knauff* v. *Shaughnessy*, 338 U. S. 537. It held that there was no distinction between the petitioner, an alien resident, and Mrs. Knauff, who never resided in this country. "In essence", said the Court, "their status is the same. They are both aliens" (R. 44) * * * "a resident alien seeking admission to the United States upon his return from abroad is subject to all the exclusion provisions of the immigration laws * * *. Each return of an alien from abroad is a new entry * * *" (R. 44). In support of this position the Court quoted from *Lewis* v. *Frick*, 233 U. S. 291 (R. 45).

The Court of Appeals for the Second Circuit held the *Knauff* case applicable to the petitioner here despite his residence. The Court wrote that "a resident alien who voluntarily goes to a foreign country is subject upon his return to all the excluding provisions of the immigration law, 'the same as if he had no previous residence or domicile in this country. *Lewis* v. *Frick*, 233 U. S. 291, 297'" (R. 52, R. 53; 192 F. 2d 1009, 1011).

Summary of Argument

When the *Knauff* case was before this Court, the Solicitor General argued that a resident who had gained a foothold here is protected by the Fifth Amendment, but that Mrs. Knauff approaching our shores for the first time was not entitled to procedural due process (*infra*, p. 11).

In this case, the Government has convinced the lower court that a resident alien who had filed his declaration of intention is, on returning to his home in this country

from a short business trip, in no different position, so far as constitutional protections are concerned, than an alien who seeks admission to this country for the first time.

This was done through a misapprehension of the rule laid down in *Lewis* v. *Frick* (*supra*), and similar cases. Those cases hold that the term "entry" as used in the immigration laws may, under certain circumstances, connote either an original or a subsequent entry. But those cases deal only with laying down the categories of undesirability—whether an alien could be held excludable or deportable at the time of entry or re-entry. They do not even remotely hold that a resident can be denied the constitutional right to present facts to establish that he as an individual is not within the categories justifying deportation. Indeed, so far as they can be said to have touched upon the question, they leaned in the other direction, for in every one of the decisions of any federal appellate court cited by the Government or in the opinions below, which involved a resident, the alien, as the opinions note, had been given a hearing. And the Court, in the *Lewis* and other cases, considered whether or not the hearing had been a fair one (*infra*, pp. 21-23).

Not only is there no authority for denying procedural due process to a returning resident, but the principles underlying all the decisions involving returning resident aliens lead to or reach the opposite result. For all the reasons for affording the constitutional protection to a resident who does not leave the country (*infra*, pp. 11-16) apply to a resident who leaves it temporarily with the intention of returning immediately. Under such circumstances, the alien's allegiances, responsibilities, rights and obligations are unchanged (*infra*, pp. 16-20).

The denial of the most fundamental of all constitutional protections to a resident alien, baneful at all times, is

demonstrably evil here. When the petitioner was given a chance to present his case, his moral character was approved by the Attorney General and the Congress, and he was passed as a good security risk by the Commandant of the Coast Guard. Yet, *four months* after his last clearance, he was ordered deported without any indication as to the charge against him, without anyone being able to know whether the immigration authorities even considered the data that had been presented to the Attorney General and the Coast Guard (*infra*, pp. 24-27).

The regulations under which petitioner was ordered deported refer to aliens. They do not expressly or impliedly require the interpretation that a returning resident alien can be deprived of procedural due process. If the regulations expressly so provided, they would be invalid as unreasonable; if the statute so provided, it would be unconstitutional (*infra*, pp. 28-30).

ARGUMENT

I.

This Court has long recognized the fundamental distinction between a resident alien who is entitled to due process and an alien entrant who may not be. The *Knauff* case, relating as it did to an entrant, has no application here.

1. The Constitution makes no distinction between resident aliens and citizens so far as procedural due process is concerned.

The Fifth Amendment provides that "No person * * * shall be deprived of life, liberty or property without due process of law".

The regulations involved here came before the Court for the first time in the *Knauff* case. Mrs. Knauff was seeking admission to our shores; she had never been in the United States. This Court held that she was not entitled to the protection of the Fifth Amendment. That decision finds support in earlier cases.

The philosophy behind according constitutional protection to citizens and alien residents alike but not to new entrants is set forth in the concurring opinion of Mr. Justice MURPHY in *Bridges* v. *Wixon*, 326 U. S. 135, 161:

> "The power to exclude and deport aliens is one springing out of the inherent sovereignty of the United States. *Chinese Exclusion Case*, 130 U. S. 581. Since an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. *Turner* v. *Williams*, 194 U. S. 279. The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority."[3]

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[3] Other cases applying this principle to entrants or to persons who, though physically in the United States, have never gained lawful entry therein are: *Nishimura Ekiu* v. *U. S.*, 142 U. S. 651, 660, 661; *Japanese Immigrant Case*, 189 U. S. 86, 98; *Fong Yue Ting* v. *U. S.*, 149 U. S. 698, 713, 734, 737.

2. The distinction so far as procedural due process is concerned between a resident alien and an alien entering the country for the first time, and hence the distinction between the deportation of a resident and the exclusion of an entrant, is based upon fundamental differences of rights and responsibilities. These differences have been recognized by this Court in an unbroken line of precedents for sixty years.

In the *Knauff* case this Court made it clear that it was not dealing with the case of a resident (338 U. S. at p. 543). And the Solicitor General, in his brief to this Court, clearly pointed out the distinction between the case of a resident alien who is entitled to due process and an alien entrant who, he argued, is not.[4]

The position and rights of the alien resident have been too recently expounded by this Court to require further elaboration, *Johnson* v. *Eisentrager*, 339 U. S. 763, 770:

> "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes prelimi-

[4] In arguing that Mrs. Knauff was not entitled to a hearing, the Solicitor General wrote:

> "Petitioner's constitutional arguments are founded in part on a failure to observe the distinction between the deportation of aliens residing within the United States and the exclusion of aliens who, *never having resided* or even been physically present in the country, seek to enter. The alien who resides here and who is sought to be deported may claim the full protection of the due process clause of the Constitution. (Citing cases.) *But petitioner is an alien seeking entry to the United States. She has gained no foothold here.* In contemplation of law she is regarded as stopped at the boundary line while her eligibility to enter is adjudicated. (Citing cases.) A person so situated is not entitled to claim the full protection of the Constitution, even if he claims to be an American citizen, which petitioner does not. (Citing cases.)" (Italics supplied.) Brief of Solicitor General, pages 27-28.

nary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. The *Japanese Immigrant Case*, 189 U. S. 86; *Low Wah Suey* v. *Backus*, 225 U. S. 460; *Tisi* v. *Tod*, 264 U. S. 131; *United States ex rel. Vajtauer* v. *Comm'r*, 273 U. S. 103; *Bridges* v. *Wixon*, 326 U. S. 135; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356."

The decision of the courts below, denying procedural due process to an alien resident who has applied for citizenship, obliterates the distinctions heretofore recognized between entrants and residents. But it cannot wipe out the actual differences between the two groups which lie at the basis of the decision of this Court.

Because of the seriousness of the situation, we, at the risk of stating the obvious, detail the factual differences that lie at the root of the decisions of this Court, distinguishing between entrants and residents:

(a) *Stake in the country.* Banishment for one who has become eligible for American citizenship is a deprivation to which any other kind of punishment is hardly comparable, especially where one lives here with his family and has his occupation here. More than ever is this true where the alien may find that he cannot go to the country of his birth (R. 36), or that that country represents the kind of government with which he may be out of sympathy.

The extreme hardships were recognized a century and a half ago by James Madison.[5] The same recognition is given by recent decisions of this Court: *Bridges* v. *Wixon*, 326 U. S. 135, 154; *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; *Johnson* v. *Eisentrager*, 339 U. S. 763, 770; *Carmichael* v. *Delaney*, 170 F. 2d 239, 242, 244 (C. A. 9).

(b) *Allegiance and Obligations.* An alien resident is bound to obey all the laws of the country not immediately relating to citizenship, and is equally liable with citizens for any infractions of its laws. *Eisler* v. *United States*, 170 F. 2d 273, 279 (C. A. D. C.); *Leonhard* v. *Eley*, 151 F. 2d 409, 410 (C. A. 10).[6]

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[5] President Madison said:

> "If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; * * * if, moreover, in the execution of the sentence against him he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." (4 Elliot's Debates, 555.)

[6] In England it has long been assumed that an alien who retains his residence in the country is punishable for treason though committed outside of the juris diction.

"Local allegiance is that which is due from a foreigner during his residence here; and is founded in the protection he enjoys for his own person, his family, and effects, during the time of that residence. This allegiance ceases whenever he withdraws with his family and effects; for his temporary protection being then at an end, the duty arising from it also determines. But if he only go abroad himself, leaving his family and effects here under the same protection, the duty still continues: and if he commit treason, he may be punished as a traitor: and this whether his own sovereign be at enmity or at peace with ours." (1 East, Pleas of the Crown (1801) 53.)

See to the same effect *Foster's Crown Cases*, 3rd Ed.; pages 183, 185, cited with approval in *Joyce* v. *The Director of Public Prosecutions* (the Lord Haw-Haw case) L. R. (1946) A. C. 347, 366, 367. The *Joyce* case applied the maxim *"Protectio trahit subjectionem et subjectio protectionem"* (p. 366).

Among other obligations, a person who has declared his intention is liable to perform military duty in the service of the United States. (10 U. S. C. 1). He is taxable, in the same way as a citizen, upon income derived from all sources including sources without the United States. *Stallforth* v. *Helvering*, 77 F. 2d 548, 549 (C. A. D. C.).

(c) *Rights.* An alien resident is entitled to substantially all of the rights of a citizen, including the oportunity to earn a living, *Takahashi* v. *The Fish and Game Commission*, 334 U. S. 410, 416; *Truax* v. *Raich*, 239 U. S. 33, 42 and the privilege, when eligible, to become a citizen.[7]

None of these allegiances, obligations, rights or dislocations appertain to entrants.

So fundamental is the distinction between resident aliens and new entrants that three distinguished Justices of this Court, in their dissenting opinions in *Fong Yue Ting*, 149 U. S. 698, expressed the view that there was no inherent power to deport.[8]

Justice FIELD, speaking of the "wide and essential difference" betwen exclusion and deportation (149 U. S. 746), stated that the power of the Government to exclude foreigners from this country, that is to prevent them from entering it, had never been denied. But he added that the power to deport persons lawfully domiciled in the country and engaged in the ordinary pursuits of life had never been exerted except under the Alien Act of June 25, 1798. According to Justice FIELD the Alien Act, had been denounced as unconstitutional and barbarous (*id.*, p. 747);

[7] One of the most important rights incident to domicile lawfully acquired is the right to retain the same, and this necessarily includes the capacity to leave and return to it at will. (Clement L. Bouvé, *Restrictions on the Admission of Aliens*, V. American Society of International Law, Proceedings (1911) p. 107.)

[8] These three Justices, FIELD, BREWER and FULLER, C. J., had also concurred in the opinion in the *Chinese Exclusion* case (130 U. S. 581), and FIELD, J. had written the opinion in that case.

it was limited in duration to two years and it had ever since been the subject of universal condemnation (*id.*, p. 750).[9]

3. For half a century this Court has held that a resident alien is entitled to procedural due process, at least before an executive or administrative tribunal. Deportation may not be ordered until after a fair hearing.

This rule was definitely established in the *Japanese Immigrant* case (*Yamataya* v. *Fisher*), 189 U. S. 86. That case was decided in 1903, ten years after the Court had held in the *Fong Yue Ting* case (*supra*, p. 14) that resident aliens were subject to deportation. The Court expressly recognized the broad powers of the Government to expel as well as to exclude aliens, but it held that, to guard against arbitrary powers in violation of the Constitution, the statute would be construed as requiring a hearing before a resident alien could be held deportable (*id.*, p. 101)[10].

[9] The Alien Act of June 25, 1798, 1 Stat. 570, c. 58, gave the President the power to deport aliens whom he judged dangerous to the peace and safety of the United States. But even that act gave an opportunity for a hearing. (Sec. 1.) The Alien Act was never enforced, and, in consequence, the question of its constitutionality was never passed upon.

[10] "* * * this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." (The *Japanese Immigrant* case, 189 U. S. 86, pp. 100,101.)

In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49, this Court reasserted the principle laid down in the *Japanese Immigrant* case. See to the same effect, *Johnson* v. *Eisentrager*, 339 U. S. 763, 770, 771; *cf. Carlson* v. *Landon*, 342 U. S. 524, 538.

Though the discretion to make a determination as to the deportability of an alien may be vested in an administrative official, the courts have taken great pains to ensure that the hearing must be fair in order to afford a basis for the determination. *Wong Yang Sung* v. *McGrath*, *supra*, p. 50; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 458; *Takeo Tadano* v. *Manney*, 160 F. 2d 665, 667 (C. A. 9); *Morgan* v. *United States*, 304 U. S. 1, 15.

As a minimum, the alien must be notified of the charge against him and given an opportunity to be heard in a hearing fairly conducted.

II

A resident, upon returning from a four-months' continuous voyage on an American vessel undertaken in the course of his occupation as a seaman, leaving from and returning to an American port is not, because of his short absence, divested of his "vested interest in his residence" (Learned Hand, *C. J.*, *DiPasquale* v. *Karnuth*, 158 F. 2d 878, 879 (C. A. 2)) and of the constitutional right flowing from that residence to procedural due process.

1. Petitioner's absence was temporary. He was bound by contract and intention to return to the United States.

There can, of course, be no contention that when petitioner signed articles for the voyage on the SS *Sir John Franklin* he had any intention of abandoning his residence. The voyage was undertaken as part of his regular occupe-

tion. He was under compulsion to return, for if he deserted he was subject to penalties (46 U. S. C. 701). But no compulsion was needed. *He was returning to his home.* His wife was here; the house which he owned was here; his only residence was in this country; he had applied for citizenship and it was anticipated that his application would be processed shortly after his return (R. 35).

This is not even a case of an alien's return to an unrelinquished domicile after a long absence, for when petitioner signed the articles it was for a voyage involving a round trip of four months.

There was official recognition of the trip. He was given Coast Guard clearance and, as a member of the crew, he was entitled to be readmitted without a re-entry permit.

Further recognition that his absence was temporary and that his residence was not disturbed or affected is supplied by the naturalization statute. That statute calls for continuous residence in the country. It recognizes that service by a seaman previously lawfully admitted for permanent residence, on a vessel whose home port is in the United States and which is of American registry "shall be regarded as residence within the United States within the meaning of this subchapter" (8 U. S. C. 707(d)(2)).

2. Petitioner's residence was not abandoned or disturbed by his temporary absence. The continuity of his residence was uninterrupted.

An established domicile is not lost merely by a temporary absence therefrom, unless there is an intention to abandon the domicile. 28 C. J. S., p. 32; see also *Law Ow Bew* v. *United States*, 144 U. S. 47, 63.

Within all of the tests, this was the kind of temporary absence which assumes continuance of residence. *U. S. ex*

rel. Lesto v. *Day*, 21 F. 2d 307, 308 (C. A. 2). In that case the Court held that a rule of the Department limiting a temporary absence to an absence of six months' duration was not unreasonable[11].

During the continuance of residence, the rights and responsibilities of the alien continue.

During the petitioner's absence, he remains subject to the provisions of the Draft Act. (*Ex parte Larrucea*, 249 F. 981, S. D. Cal.).

Despite his absence, he remains taxable, as a citizen is, on his income received from anywhere in the world. (*Stallforth* v. *Helvering*, 77 F. 2d 548).

An alien's allegiance to the state of his domicile is such that, though he is absent from the jurisdiction, a personal judgment may be obtained against him by substituted service effected in accordance with the law of his residence. (*Milliken* v. *Meyer*, 311 U. S. 457, 464).

In the *Milliken* case this Court wrote that the authority of a state over one of its citizens is not

> "terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. * * * 'Enjoyment of the privileges of resi-

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[11] In cognate statutes, similar absences have been held to be temporary and not to affect one's status. The effect of a re-entry permit is to "show that an alien to whom it is issued is *returning from a temporary visit abroad*". (8 U. S. C. 210(f).) Under an earlier act, when an alien was seeking to enter the United States after returning from a temporary visit of more than six months, the burden was upon him to overcome the presumption of loss of domicile. (*Navigazone Generale Italiana* v. *Elting*, 89 F. 2d 31, 34 (C. A. 2).)

For similar provisions under the Income Tax Law, see Regulation 111, Sec. 29.211-4.

Continuity of residence is broken for the purpose of naturalization if a person is absent for more than six months, except in certain cases including those where the declaration of intention has been filed. 8 U. S. C. 707(b).

For the time when the presumption of expatriation arises, see 8 U. S. C. 802.

dence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the various incidences of state citizenship. * * * The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state." (p. 464)

Accordingly, it has been specifically held that an alien resident returning to this country is entitled to a hearing on his return.

White v. *Chin Fong*, 253 U. S. 90, 92.

Holding that a statute providing for a *judicial* hearing for residents would be construed as applying to a returning resident alien.

Carmichael v. *Delaney*, 170 F. 2d 239, 244 (C. A. 9).

Holding that a *returning resident* is entitled to a *judicial trial* of his claim to be a citizen.
See to the same effect, *Lee Fong Fook* v. *Wixon*, 170 F. 2d 245 (C. A. 9); certiorari denied, 336 U. S. 914.

Petition of Hersvik, 1 F. 2d 449, 450 (S. D. Cal.).

Holding that seamen engaging themselves for a complete voyage on an American vessel starting from and returning to an American port, intending at no time to remain away from the United States or to become inhabitants of any foreign country, had not relinquished or abandoned the right to re-enter the country.

Finally, when a person returns from a temporary absence to the United States, he is, when he reaches its shores, within the physical jurisdiction of the United States. (8 U. S. C. 179; see also Presidential Proclamation No. 2523, appendix, p. 2a), and, therefore, within its constitutional protection—the continuity of his residence having never been interrupted. In this respect, he is unlike persons who though physically on the continent of the United States, have never legally gained entry therein. *Chin Yow* v. *U. S.*, 208 U. S. 8; *Kaplan* v. *Tod*, 267 U. S. 228; *Zartarian* v. *Billings*, 204 U. S. 170, 175.

In the last generation, world frontiers have shrunk and foreign travel has become commonplace. Were it not for the decision below, it would be inconceivable that the three million aliens in this country should be so discriminated against that they cannot leave the country in pursuit of their occupation, or on business trips, or to see their relations, for a period however short, without losing the constitutional rights to due process which they along with citizens enjoy. Aliens do take risks when they leave the country. If Congress should decide upon new categories of undesirability, an alien re-entering the country might be deportable if he came within those categories. But, until the decision below, no federal appellate court held that he took the further risk that he might be denied the right to be informed of the charges against him and to have a hearing to show that he was the victim of mistaken identity or that he was not within the categories of undesirability laid down by Congress.

3. The cases on which the Government relies for the proposition that a returning alien resident is in the same position as an entrant so far as due process is concerned do not support the Government's position.

The Government's contention, as expressed in its brief in opposition to certiorari (pp. 13, 14), is as follows:

> "* * * an alien who has departed from the United States, by that act of departure, loses the protection which stemmed from his prior presence in the country, and upon his attempt to reenter is in no different position from any other alien applicant for entry. Since, under the *Knauff* decision, alien applicants for entry may be excluded without a hearing, petitioner is in no different position."

The short answer is that the Government's contention not only runs counter to the principles and authorities heretofore discussed, it finds no support in *Lewis* v. *Frick*, or the other cases on which the Government relies. Those cases interpreted and defined the categories of deportability established by Congress. Though in each of the cases the question of the right of a particular alien to remain in this country was decided, in no case was the procedural protection to be afforded him at issue. The cases neither held nor implied that an alien resident could be deprived of the constitutional right to present facts showing that he was not within the categories warranting deportation.

Indeed in every one of the cases relied upon by the Government which went to an appellate court and which involved an alien resident, not only had there been a hearing,—in some of the cases the Court considered whether or not the hearing had been fair.

(a) *Lewis* v. *Frick*, 233 U. S. 291, is the case quoted from in the opinion of the District Court (R. 45) and in the opinion of the Court of Appeals (R. 52). The Court was

there construing a provision of the law requiring deportation proceedings to be brought within three years after entry.

The alien, who for some years had been a resident of this country, had crossed the river into Canada and brought back with him a prostitute. He contended that the three years should have run from the time he first entered the country. The Court held that the three years ran from the subsequent unlawful entry with a prostitute. In that connection, the Court said if the alien left the country for even a short space of time and "on re-entering brought into the country a woman for the purpose of prostitution or other immoral purpose, he subjected himself to the operation of the clauses of the act *that relate to the exclusion and deportation of aliens*,[12] the same as if he had no previous residence or domicile in this country". (p. 297) (Italics supplied.) This statement does not, on its face, indicate that the Court intended to pass upon the constitutional rights of an alien to a hearing. That it was not passing upon these rights is clear from the further statement of the Court pointing out that there was a hearing with sufficient evidence to support the ruling of the Secretary of Commerce and Labor. The Court said "and there being no contention that the hearing was not fairly conducted, the finding of the Secretary upon the question of fact is binding upon the courts" (p. 300).

(b) The cases applying the doctrine in *Lewis* v. *Frick* dealt solely with the question of statutory interpretation—what kind of people are deportable upon entry or re-entry, within what time after entry or re-entry must deportation proceedings be started, what sort of documentation must aliens entering or re-entering the country have in their possession, and the like. At times the courts have

[12] A comparison of the quotation from the *Lewis* case with the language of the Government's contention (*supra*, p. 21), emphasizes the Government's misconstruction of the *Lewis* holding.

blocked efforts of the Government to stretch the doctrine of the *Lewis* case to untenably technical extremes. *Delgadillo* v. *Carmichael, supra,* 332 U. S. at p. 391; *Di Pasquale* v. *Karnuth,* 158 F. 2d 878, 879 (C. A. 2). But until the decision below, no appellate court was called upon to hold and no appellate court held or implied that a resident could be denied the right to show that he was not within the deportable class, that the proceeding was or was not brought within the specified time, or that he did not have the necessary documentation.

(c) This is demonstrated further by the fact that in each of the appellate cases referred to either in the opinions of the lower courts or in the Government's brief, the opinion showed that there was a hearing and that in some of the cases the Court considered whether the hearing had been fair.[13]

Indeed, in *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, this Court denied the right to a *judicial* hearing on the question of citizenship on the ground that a full and fair administrative hearing had been held, and implied (p. 358) that the decision would have been otherwise had the petitioner been a resident of this country.[14]

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[13] *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, 424; *Roovers* v. *Kessler,* 90 F. 2d 327, 328 (C. A. 5); *McCandless* v. *United States ex rel. Pantoja,* 44 F. 2d 786, 787 (C. A. 3); *United States ex rel. Siegel* v. *Reimer,* 23 F. Supp. 643, 644, affirmed 97 F. 2d 1020 (C. A. 2); *Lewis* v. *Frick,* 233 U. S. 291, 293; *Labina* v. *Williams,* 232 U. S. 78, 83; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 729; *United States ex rel. Staff* v. *Corsi,* 287 U. S. 129, 131; *United States ex rel. Claussen* v. *Day,* 279 U. S. 398, 400; *Bendel* v. *Nagle,* 17 F. 2d 719 (C. A. 9); *United States ex rel. Lamp* v. *Corsi,* 61 F. 2d 964, 965 (C. A. 2).

In *Nishimura Ekiu* v. *United States,* 142 U. S. 651, the court sustained the exclusion of an alien immigrant *entrant* found by the immigration inspector without formal hearing as likely to become a public charge, stating (p. 660): "It is not within the province of the judiciary to order that foreigners *who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law,* shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government." (Italics supplied.)

[14] See dissenting opinion of Judge FRANK in *Medeiros* v. *Watkins,* 166 F. 2d 897, 900, 902 (C. A. 2) to the same effect.

III

The petitioner was not permitted to know the charges against him nor to have a hearing on those charges. This denial of due process is especially shocking in the case of the petitioner for when he had a chance to state his case, he was approved by public officials as to his character and as to his meeting security requirements.

1. It goes without saying that the tap on the shoulder, and then detention, and then banishment, without any explanation, is abhorrent to the traditions of fair play embodied in the due process provision.

"The imagination can hardly create a situation more incompatible with the spirit of our institutions", wrote HEALY, *J.*, "than that one civil official's completely secret viewpoint could be the basis of sustaining imprisonment." [15] *Carlson* v. *Landon*, 186 F. 2d 183, 189 (C. A. 9); *Cf. Kwock Jan Fat, supra*, 253 U. S., at p. 464.

Here there is not only imprisonment, but there is banishment and the loss of the most important personal and family rights, including the right to become an American citizen.

2. The denial of due process is especially evil in the case of the deportation of residents.

The international goodwill of the United States must be impaired if it can be said that despite our constitutional provisions alien residents cannot get fair hearings. (National Commission on Law Observance and Enforcement, *Report on Deportation*, pp. 28, 29.)

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[15] The District Court, though it felt bound by the *Knauff* case and the Government's argument concerning *Lewis* v. *Frick*, and the other cases interpreting the entry provisions, expressed its concern that an alien resident could be ordered deported in the absence of any hearing before any board (R. 42), and without knowing what charges had been levelled against him (R. 45).

But, apart from public relations, it is deeply repugnant to our sense of fair play that persons who are strangers to the laws and customs, and who often do not even understand the language in which they are accused *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 should be deprived of any hearing whatsoever, especially where this country has gone to such lengths to assure that administrative hearings shall be fairly and responsibly conducted (*id.*, p. 41, *et. seq.*).

The Immigration and Naturalization Service obtains much of its information by means of secret communications. For a time the regulations cautioned immigration authorities not to lend their aid in causing the arrest of aliens upon charges arising out of spite or enmity unless the truth of the charges is clearly established, National Commission on Law Observance and Enforcement, *Report on Deportation*, p. 52. But this rule is no longer in effect, and the opportunity for "the malevolent, the misinformed, the meddlesome and the corrupt" to vent their grudges or express their suspicions is much enchanced if the doctrine of the decision below stands. For the authorities may act without any sense of responsibility if their decisions, based upon secret information, may not be questioned. In a period of fear such as exists today, there is little chance that a routine official will disregard a charge against an alien though that charge is based upon the merest hearsay. Nor is there much likelihood of a careful review in the Attorney General's office if there can be no hearing and no publicity. *Cf.* dissenting opinion of Mr. Justice JACKSON in *Knauff* v. *Shaughnessy*, 338 U. S. at p. 551.

If the immigration authorities can exclude a resident alien on their mere statement that his entry would be prejudicial to the interests of the country; all of the experi-

ence that has caused the erection of safeguards against arbitrary actions of petty officials (*Cf. Boyd* v. *United States*, 116 U. S. 616, 625) is disregarded.[16]

If an alien resident, especially one who has wholeheartedly thrown his lot in with ours and has applied for citizenship, cannot leave the country on a business trip, cannot follow his occupation as a sailor, cannot visit relatives, cannot even go across the border to look at the Canadian side of Niagara Falls, without exposing himself to arbitrary deprivation of all that he values, he is indeed treated as a second-class resident,—contrary to the constitutional conceptions that have heretofore prevailed. *Takahashi* v. *The Fish and Game Commission*, 334 U. S. 410, 420.

3. The evil is emphasized in this case. Twice when the petitioner was given an opportunity to be heard, he was approved by the Attorney General and Congress as being over a period of years a person of good moral character and by the Commandant of the Coast Guard as being a good security risk. *Within four months* after the last clearance he was ordered deported without a hearing.

There is nothing in the record to show that even the evidence that satisfied the Attorney General, the Congress and the Commandant was presented to the authorities when petitioner was ordered deported.

In *Kwock Jan Fat* v. *White*, 253 U. S. 454, the petitioner, intending to leave the United States on a temporary visit to China, obtained upon a pre-investigation, the ap-

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[16] Reported cases illustrate the dangers. In the *Knauff* case, where after great public resentment the Attorney General consented to accord a hearing to Mrs. Knauff, the charges were shown to be based upon insubstantial if not irresponsible hearsay. Board of Immigration Appeals, decision dated August 29, 1951, Case No. A6937471). A similar situation was disclosed in *Iodice* v. *Wixon*, 56 F. 2d 824, 825 (C. A. 2).

proval of the Commissioner of papers showing his status as a native American. With this evidence in his possession, which this Court said "he was amply justified in believing would secure his readmission to the United States" (*id.* p. 456), he went to China.

On the basis of anonymous information received by the Commissioner while the alien was abroad, he was, on his return, excluded on the ground that the claimed American citizenship was not established to the satisfaction of the Commissioner. The Commissioner's decision was sustained by the Secretary of Labor.

This Court reversed and sustained the writ of *habeas corpus* on the ground that important testimony of reputable witnesses supporting the alien's claim of native birth had not been included in the record before the Secretary. "A report" the Court said, "which suppressed or omitted [such evidence] * * * was not a fair report and a hearing based upon it was not a fair hearing * * *" (*id.* p. 464).

Here, the petitioner has been ordered deported, despite the fact that he has lived an orderly, law-abiding life, and that he knows of no reason why he should either be deported or not be permitted to prosecute his petition for naturalization which is pending.

If the Commandant of the Coast Guard had turned him down as a bad security risk, he could have taken an appeal 33 C. F. R. 6.10-9, or he could have remained in the country with the secure knowledge that his rights as a resident could not be arbitrarily destroyed. To let him go out of the country with the right to return, and then to exclude him without a hearing—without even the opportunity to establish that it is a case of mistaken identity—is on a par with entrapment.

4. The attitude of the Government indicates how far responsible officials have strayed from the constitutional path of due process.

The Government's brief in opposition to certiorari says (p. 16):

> "We do not mean to say, of course, that the petitioner is prevented from presenting any evidence he may have to the Attorney General to overcome the determination that the petitioner's entry would be prejudicial to the public interest."

Under the broad label "prejudicial to the interests of the United States", the Attorney General may have concluded that the petitioner was deportable upon any one of the numerous grounds specified in the immigration laws, 8 C. F. R. 175.57(a), 175.53(a) (Appendix, pp. 9a, 7a).

Just how a law-abiding person who does not know what the charge against him is can produce evidence to overcome that charge is not explained by the Attorney General. *Cf. Takeo Tadano* v. *Manney*, 160 F. 2d 665.

IV

Regulation 8 C.F.R. 175.57(b) applied to deny a hearing to alien residents is unreasonable and invalid. 8 U. S. C. 137-4 so applied is unconstitutional.

Petitioner's deportation was ordered under the authority of 8 C. F. R. 175.57(b) (Appendix, p. 10a). The genesis of the regulations is as follows:

The Statute

Title 22 U. S. C. 223 provides that when the United States is at war and during the existence of the national emergency proclaimed by the President on May 27, 1941,[17]

[17] This Proclamation, No. 2487, proclaimed "that an unlimited national emergency confronts this country which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression toward any part of the Western Hemisphere".

it shall be unlawful "for any alien * * * to enter the United States except under such reasonable rules, regulations and orders, and subject to such limitations and exceptions as the President shall prescribe" (Appendix, p. 1a).

The Proclamation

Presidential Proclamation No. 2523 of November 14, 1941, finding the circumstances of the national emergency proclaimed on May 27, 1941 as still existing, and reciting that "there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere", authorized the Secretary of State, with the concurrence of the Attorney General, to prescribe rules and regulations.

The proclamation provided that no alien be "permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interest of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General" (Appendix, p. 4a).

By Presidential Proclamation No. 2850, the power to exclude was vested in the Attorney General instead of in the Secretary of State (Appendix, p. 6a).

The Regulations

Pursuant to Proclamation No. 2523, the Secretary of State and the Attorney General issued regulations which became 8 C. F. R. 175. These regulations were ratified and confirmed by Presidential Proclamation No. 2850. It was under these regulations, 8 C. F. R. 175.57(b) that petitioner was excluded without a hearing.

The statute, the proclamations and the regulations refer to aliens but no one of them expressly mentions *resident*

aliens, nor does the language of any of them compel the interpretation that the Attorney General was authorized to exercise his discretion to exclude or deport a *resident* alien without granting him a hearing. Had the regulations been expressly so written, the provisions would have been invalid as imposing an unconstitutional condition. *Japanese Immigrant* case, 189 U. S. at page 86, *supra*, p. 15; *Wong Yang Sung* v. *McGrath*, 339 U. S. at page 49, *supra*, p. 16.

Though the Government, in its brief in opposition to certiorari, states that it relies on 8 C. F. R. 175.57(b), there was in effect at the time the petitioner was ordered deported, a statute 8 U. S. C. 137-4, which authorized exclusion on the basis of information of a confidential nature and without a hearing (Appendix, p. 11a). As in the case of the regulations, there is no compelling reason to construe this statute as applying to resident aliens. If, however, it should be so construed, it is for the reasons stated above in violation of the Fifth Amendment.

CONCLUSION

The decision below should be reversed and the writ of Habeas Corpus sustained.

Respectfully submitted

September 22, 1952

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APPENDIX

The relevant statutes, regulations and proclamations involved are as follows:

The relevant provision of Section 223, Title 22, United States Code (Act of May 22, 1918, c. 81, § 1, 40 Stat. 559, as amended June 21, 1941, c. 210, § 1, 55 Stat. 2523), is as follows:

> When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by Sections 223-226b of this title be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations and orders, and subject to such limitations and exceptions as the President shall prescribe; * * *.

The pertinent portions of Presidential Proclamation No. 2523 of November 14, 1941 (published in the Federal Register November 18, 1941) are as follows:

> CONTROL OF PERSONS ENTERING AND LEAVING THE UNITED STATES
>
> BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
>
> A PROCLAMATION
>
> WHEREAS the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of

Congress approved on June 21, 1941 (Public Law 114, 77th Cong., chap. 210, 1st sess., 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941[1], or, as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS the national emergency proclaimed by me on May 27, 1941 is still existing; and

WHEREAS there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere; and

WHEREAS the exigencies of the present international situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me as set forth above, do hereby find and publicly proclaim and declare that the interests of the United

[1] 6 F. R. 2617.

States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States, * * * and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

* * *

(2) No alien shall depart from or attempt to depart from the United States unless he is in possession of a valid permit to depart issued by the Secretary of State or by an officer designated by the Secretary of State for such purpose, or unless he is exempted from obtaining a permit, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed; nor shall any alien depart from or attempt to depart from the United States at any place other than a port of departure designated by the Attorney General or by the Commissioner of Immigration and Naturalization or by an appropriate permit-issuing authority designated by the Secretary of State.

No alien shall be permitted to depart from the United States if it appears to the satisfaction of the Secretary of State that such departure would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by Secretary of State, with the concurrence of the Attorney General.

* * *

Presidential Proclamation No. 2850 of August 17, 1949 (published in the Federal Register August 19, 1949) provides:

> AMENDMENT OF PROCLAMATION NO. 2523[1] PRESCRIBING REGULATIONS RELATING TO THE CONTROL OF PERSONS ENTERING OR LEAVING THE UNITED STATES
>
> BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
>
> A PROCLAMATION
>
> WHEREAS Proclamation No. 2523 of November 14, 1941, issued under and by virtue of the authority vested in the President by the act of May 22, 1918, 40 Stat. 559, as amended by the act of June 21, 1941,

[1] 3 CFR. Cum. Supp.

55 Stat. 252, prescribes regulations which impose certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS I find that the interests of the United States, within the meaning of the said act of June 21, 1941, and by reason of the continued existence of the conditions set forth in section 1 thereof, require that the said proclamation be amended as hereinafter set forth:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in the President by the act of Congress above mentioned, do proclaim as follows:

1. The said Proclamation No. 2523 is hereby amended so that paragraph numbered (3) thereof, together with the succeeding unnumbered paragraph, shall read as follows:

"(3)(a) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe.

"(b) No permit to enter shall be issued to an alien if it appears to the satisfaction of the issuing officer, or the Secretary of State, that the alien's entry would be prejudicial to the interests of the United States within the meaning of the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General.

"(c) Notwithstanding the provisions of the foregoing paragraphs (a) and (b), no alien applying for admission, even with a valid permit to enter, shall enter or be permitted to enter the United States if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States."

2. All existing regulations promulgated under or pursuant to the said Proclamation No. 2523 are hereby ratified and confirmed and shall be construed to have the same effect as if included in such proclamation: *Provided however*, that nothing contained herein shall be deemed to limit lawful authority to amend or modify such regulations.

* * *

Pursuant to the authority conferred by Presidential Proclamation No. 2523, the Secretary of State, with the concurrence of the Attorney General, issued regulations (6 F.R. 5911-5918), which were from time to time amended and revised (10 F.R. 5889-5893; 10 F.R. 8995-8996, 8997-9002; 10 F.R. 15332, 15333-15335) and eventually codified, on July 30, 1947, as Part 175 of Title 8 of the Code of Federal Regulations (12 F.R. 5065, 5135-5142). These regulations provide in pertinent part (8 C.F.R. [1949 ed.], Part 175):

Part 175—Control of Persons Entering And Leaving The United States Pursuant To The Act of May 22, 1918, As Amended

* * *

ALIENS ENTERING

§ 175.52 *Refusal of permission to enter.* (a) No permit to enter shall be issued to any alien if the permit-issuing authority has reason to believe that the entry of the alien would be prejudicial to the interests of the United States.

* * *

§ 175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§175.41 to 175.62, inclusive:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended [anarchists, opposers of organized government, advocates of violent overthrow of the United States Government, etc.]. (* * * 8 U.S.C. 137).

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war, by the United States.

(d) Any alien engaged in activities designed to obstruct * * * the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct * * * the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (* * * 55 Stat. 252 * * *).

(i) Any alien enemy [with specified exceptions].

(j) Any alien found to be, or charged with being, a war criminal * * * or an alien who has been guilty

of * * * conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252 * * *) to safeguard.

* * * *

§ 175.57 *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry[1] shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines

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[1] Boards of special inquiry are provided for by Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885-887, as amended, which provide in pertinent part:

Sec. 16 [8 U. S. C., Supp. IV, 152]. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this Act the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. * * *

Sec. 17 [8 U. S. C. 153]. Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal * * * to the Attorney General * * *. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

* * *

Section 137-4, Title 8, United States Code (The Act of October 16, 1918, c. 186, § 5, as added September 23, 1950, c. 1024, Title 1, § 22, 64 Stat. 1006), provides:

> § 137—4. **Temporary exclusion of subject subversive aliens; determination and deportation.**
>
> Notwithstanding the provisions of Sections 152 and 153 of this title, which relate to boards of special inquiry and to appeal from the decisions of such boards, any alien who may appear to the examining immigration officer at the port of arrival to be excludable under Section 137 of this title shall be temporarily excluded, and no further inquiry by a board of special inquiry shall be conducted until after the case is reported to the Attorney General and such an inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under 137 of this title on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest, safety, or security, he may deny any further inquiry by a board of special inquiry and order such alien to be excluded and deported.